IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-6593

DANIEL WILBUR GARDNER,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at _____So.2d_____(Fla. 1975), Case No. 45,106, opinion filed (slip opinion) February 26, 1975 and is attached hereto as Appendix A.

JURISDICTION

Respondent has no quarrel with the jurisdiction of this Court pursuant to Title 28, United States Code, §1257(3), or under any other provision thereof, at least for purposes of determining whether to decline assumption thereof.

QUESTIONS PRESENTED

QUESTION ONE

WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF FIRST DEGREE MURDER UNDER THE LAW OF FLORIDA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

QUESTION TWO

WHETHER THE TRIAL JUDGE ERRED IN CONSIDERING FACTUAL ALLEGATIONS IN A PRESENTENCE INVESTIGATION REPORT WHERE THE DEATH SENTENCE IS IMPOSED.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

(2) This case also involves the following provisions of the statutes of Florida:

(a) Section 775.082, Florida Statutes.

(b) Section 782.04, Florida Statutes.

(c) Section 918.06, Florida Statutes.

(d) Section 921.141, Florida Statutes.

(3) This case also involves Rules 3.590 and 3.710, Florida Rules of Criminal Procedure.

(a) "RULE 3.590 TIME FOR AND METHOD OF MAKING MOTIONS; PROCEDURE; CUSTODY PENDING HEARING

"(a) A motion for new trial or in arrest of judgment, or both, may be made within four days, or such greater time as the court may allow, not to exceed fifteen days, after the rendition of the verdict or the finding of the court.

"(b) When the defendant has been found guilty by a jury or by the court, such a motion may be dictated into the record, if a court reporter is present, and may be argued immediately after the return of the verdict or the finding of the court. The court may immediately rule upon the motion.

(c) Such motion may be in writing, filed with the clerk; it shall state the grounds on which it is based. A copy of a written motion shall be served on the prosecuting attorney. When the court sets a time for the hearing thereon, the clerk may notify counsel for the respective parties, or the attorney for the defendant may serve notice of hearing on the prosecuting offi cer.

"(d) Until such motion is disposed of, a defendant who is not already at liberty on bail shall remain in custody and not be allowed his liberty on bail unless the court upon good cause shown (if the offense for which the defendant is convicted is bailable) permit the defendant to be released upon bail until the motion is disposed of. If the defendant is already at liberty on bail which is deemed by the court to be good and sufficient, it may permit him to continue at large upon such bail until the motion for new trial is heard and disposed of.

"(b) Substantially the same as first part of Section 920.02(2). The Rule omits the requirement that the defendant be sentenced immediately upon the denial of his motion for new trial (the court might wish to place the defendant on probation or might desire to call for a pre-sentence investigation). The Rule also omits the statute's requirement that an order of denial be dictated to the court reporter, since the clerk is supposed to be taking minutes at this stage.

"(c) Substantially same as Section 920.03.

"(d) Substantially same as last part of Section 920.02(3) except that the last sentence of the Rule is new."

(b) "RULE 3.710. PRESENTENCE REPORT

"[Prior Rule 3.710 transferred to Rule 3.730].

"In all cases in which the court has discretion as to what sentence may be imposed, the court may refer the case to the probation and parole commission for investigation and recommendation. No sentence or sentences other than probation shall be imposed on any defendant found guilty of a first felony offense or found guilty of a felony while under the age of 18 years, until after such investigation has first been made and the recommendations of the commission received and considered by the sentencing judge."

A photostatic copy of the above cited sections of the Florida Statutes are attached hereto as Appendix B.

STATEMENT OF THE CASE

Petitioner, Daniel Wilbur Gardner, a white man, was sentenced to death on January 30, 1974 in the Circuit Court of the Fifth Judicial Circuit of Florida, in and for Citrus County, upon conviction for the premeditated murder of his wife, Mrs. Bertha Mae Gardner, a white woman. The Florida Supreme Court on February 26, 1975 affirmed petitioner's first degree murder conviction and death sentence. See Appendix A.

STATEMENT OF THE FACTS

Glenda Mae Demney, presently residing in Tampa, Florida, suffered a traumatic experience on June 29, 30, 1973. On that date, she was living in Homosassa, Florida. She lived in a trailer right beside her daughter, Bertha Mae Gardner, and her husband, petitioner, Daniel Wilbur Gardner (R Vol.II, pp. 166, 167). Glenda Mae saw her daughter around 7:00 o'clock on June 29, 1973 (R Vol.II, p. 168). Later, after dark, Glenda Mae and Bertha Mae took Bertha Mae's children to the home of Glenda Mae's youngest son. Glenda Mae and Bertha Mae then went on to the Sugar Mill, a local tavern. Glenda Mae let her daughter out at the Sugar Mill and then went back home (R Vol.II, pp. 169, 170). Later Glenda Mae saw Bertha again when Bertha came to her trailer and said she was out of cigarettes. This was about 10 or 10:30 p.m., and Bertha remarked that she was going to look for her husband, petitioner Gardner. As far as Glenda Mae knew Bertha had not had anything of an alcoholic nature to drink (R Vol.II, p. 171). On that particular evening, Glenda Mae was keeping company with Calvin Loenacker, more popularly known as Buckshot. Later in the evening or perhaps in the early morning hours, Glenda Mae and Buckshot were in her trailer. She was

fixing her lunch for the next morning and sipping along on a beer. All of a sudden, the door, hinges and all, came off and her son-in-law, Daniel Wilbur Gardner petitioner was behind it. He hit Glenda Mae on the side of the face, and she was knocked out (R Vol.II, p. 172). The next morning, Glenda Mae was fixing some coffee when her son-in-law came over again and said that her daughter, Bertha Mae, wasn't breathing right (R Vol.II, p. 174). Glenda Mae went next door and saw her daughter naked on a bed with bruises on her face. Glenda Mae didn't know if Bertha was unconscious or not. But as far as she could determine, her son-in-law was not drinking that morning and he did not appear to be intoxicated. She stated that he had been drinking the night before when he came to her trailer and struck her but he was not drunk (R Vol.II, pp. 175, 176). No question about it, Glenda Mae flatly denied a contention that her son-in-law came to her house, knocked on the door and inquired about the whereabouts of his children. Glenda Mae further denied that she slammed the door in her son-in-law's face, that he then kicked the door and it flew open and hit her and knocked her down (R Vol.II, p. 182). Glenda Mae remarked again that her son-in-law knocked her out with his fist and kicked her in the end of her spine "and the door didn't do that." (R Vol.II, p. 183).

Alva Loenecker was a commercial fisherman and long time friend of petitioner Gardner and his wife (R Vol.II, p. 185). He was at Glenda Mae's house on June 29, 1973 drinking some whiskey. At about 11 or 11:30 p.m., petitioner Gardner came over, drug the door off the trailer, came in and hit Glenda Mae and knocked

her out on the floor (R Vol.II, p. 186). Buckshot asked him not to do that any more. Petitioner Gardner remarked that he was going back and beat Hell out of his wife. Buckshot saw Bertha Mae at the door of her trailer, and then gesturing, said that petitioner was pulling her head down at which time Bertha said, "please don't hit me any more." (R Vol.II, p. 187) Approximately 35 minutes later, petitioner Gardner returned to the trailer where Glenda Mae and Buckshot were. Petitioner wanted to jump on Glenda Mae again but Buckshot apparently talked him out of it. Nothing was mentioned concerning the whereabouts of petitioner's children (R Vol.II, p. 188). The next morning, petitioner came to the trailer, called Buckshot and said something was wrong with his wife, Bertha Mae (R Vol.II, p. 189). Glenda Mae got up and she and Buckshot went to petitioner's trailer. On entering the trailer, Buckshot saw Bertha Mae and petitioner remarked that he couldn't understand why his wife didn't wake up. Buckshot said that Bertha Mae looked like she was dead. Petitioner asked him to go call the ambulance (R Vol.II, p. 190).

Nellie Merkerson is the mother of petitioner. She saw Buckshot on the morning of June 30, 1973 and as a result went to the trailer where her son and his wife were living (R Vol.II, p. 196). On arrival at the trailer, she asked her son what had he done, and he denied having done anything at all (R Vol.II, p. 197). After this, Nellie went back to her house, called her daughter-in-law and asked her to call the ambulance. Nellie then returned to her son's trailer and when she saw what had happened and asked her son about it, he said, "She wouldn't tell me where

my babies are and I tried to get her to tell me and she wouldn't so I kept on beating her." (R Vol.II,

David Merkerson is the half-brother of petitioner (R Vol.II, p. 200). David lived about 150 feet from the trailer where petitioner and his wife lived. He went to their trailer on the morning of June 30, 1973. His mother, Nellie Merkerson, his wife Susan, and Bertha's mother, Glenda Mae, were there (R Vol.III, p. 201). Buckshot was outside. When David Merkerson saw Bertha Mae, she was on the bed and "she was dead." A sheet had been pulled up all the way to her neck (R Vol.II, p. 202). David was present when petitioner was placed in the patrol car (R Vol.III, p. 203). At that time, petitioner remarked to him, "Dave, I guess I really did it this time." David answered, "Yes, I guess you did." (R Vol.III, p. 204)

Susan Merkerson is the aunt of petitioner. She lived less than one-half block from where petitioner and his wife lived. Her rest was disturbed at approximately 11:30 p.m. on June 29, 1973 when she was awakened by noises emanating from petitioner's trailer which sounded like someone was bumping or moving furniture around (R Vol.III, p. 206).

Walter Owezarek is an emergency medical technician and on the morning of June 30, 1973 went to the residence of Daniel Wilbur Gardner and Bertha Mae Gardner (R Vol.III, p. 207). Upon arrival, Walter asked where the patient was (R Vol.III, p. 208). Petitioner pointed to a room. Walter saw a woman lying on a bed and examined her but found no vital signs. He looked at her entire body and saw a gigantic hematosa in the pelvic area (R Vol.III, pp. 209, 210). The woman had been so badly bruised that Walter inquired

from the petitioner as to how it happened. Petitioner remarked that his wife probably went out and got some drugs and when she came back she told petitioner to hit her and that he constantly kept pounding on her. When Walter heard this, he called the Sheriff's Department and they all stood by and waited for the officers to arrive (R Vol.III, p. 211). Later after receiving permission from the law enforcement officers, Walter and the ambulance driver removed the body to the Citrus Memorial Hospital (R Vol.III, p. 215).

Lloyd Shelton had been employed as a deputy sheriff of Citrus County, Florida, for approximately 8-1/2 years. On June 30, 1973, he had occasion to go to the residence of petitioner Gardner at approximately 7:00 a.m. (R Vol.III, p. 216). He had known petitioner and his wife prior to this occasion (R Vol.III, p. 217). When he looked at the nude body which had been beaten and bruised, there wasn't any sign of life. He touched the leg just below the knee, and it was cold. He radioed the sheriff's office to send Deputy Williams and for them to call Mr. Green to come to the scene (R Vol.III, p. 218). Deputy Shelton took a lot of photographs inside the premises (R Vol.III, p. 219). Deputy Shelton turned all the evidence over to Deputy George Hanstein (R Vol.III, pp. 230, 231). Later when Deputy Shelton arrested petitioner, he advised him of his constitutional rights, commonly known as Miranda warnings (R Vol.III, p. 239). After Deputy Shelton put petitioner in the car and they were driving along, petitioner remarked,

"Why would a man do something like that"--"why would I do something like that." Petitioner also commented that his wife had been running around with other people and "that thing has been eating on me,--it was just more than I could stand." (R Vol.III, p. 240) Petitioner gave a statement to Deputy Shelton and basically in the statement said that he and his wife got into a fuss after they got home and he beat her. Then she got up and took a bath and when she came back to bed, he beat her some more. And then he went to sleep and didn't wake up until the next morning (R Vol.III, p. 243).

David Chancey first saw the body of Bertha Mae at the Citrus Memorial Hospital. He took the body from Citrus Memorial to the Leesburg General Hospital. No one was with him when he transported the body (R Vol.III, pp. 244, 245). He identified a photograph of the body (State's Exhibit No. 6) as being a photograph of the body he transported.

George Hanstein was a deputy sheriff in Citrus County, Florida. He received three packages from Deputy Shelton which he initialled and processed them for turning over to the Florida Crime Lab in Sanford, Florida. Counsel for the respective parties stipulated to this fact (R Vol.III, pp. 249, 250).

Dr. William H. Shutze is a medical doctor specializing in pathology. Counsel for petitioner at trial had no objection to his qualification as a pathologist licensed to practice in the State of Florida (R Vol.III, pp. 252, 253). Dr. Shutze identified State's Exhibit No. 6 as being a photograph of a body upon which he performed an autopsy on July 2, 1973 at the Leesburg General Hospital. He ascertained that the name of the body of the deceased was Bertha Mae Gardner. This was done from a name tag on the body (R Vol.III, p. 255). Dr. Shutze described the condition of the body and stated that there were at least 100 bruises thereon (R Vol.III, p. 256). And as a result of one injury, it was his opinion that something like a broomstick, bat or bottle had been placed in the vagina (R Vol.III, p. 257). Dr. Shutze estimated that the wounds were perpetrated upon the body of the deceased by combination of instrument, fists, stomping, and rolling on the floor (R Vol.III, p. 258). The cause of death was a result of a combination of a loss of blood from a large tear in the liver and from the fracture of the pubic bone (R Vol.III, p. 259). He estimated that the deceased weighed 90 pounds (R Vol. III, p. 260). On examining the body of the deceased, it was determined that large patches of hair were missing that were not of a diseased nature. Rather, the hair loss resulted from same being pulled out (R Vol.III, p. 261). When counsel for petitioner questioned Dr. Shutze, there was quite a hassle over the identity of the body upon which the doctor performed the autopsy. In fact, counsel for petitioner moved to strike all of the doctor's testimony because he could not positively identify the body upon which he performed the autopsy as being the body of Bertha Mae Gardner (R Vol.III, pp. 262-264). A blood alcohol test was performed with a result of .19 grams percent which Dr. Shutze interpreted as indicating mild to moderate intoxication (R Vol.III, p. 267).

Chandler Smith worked in the Sanford Crime Lab as a criminalist examiner (R Vol.III, pp. 268, 269). He was qualified as an expert without objection. He

testified as to tests performed by him upon certain exhibits and the results thereof (R Vol.III, pp. 270-275).

The petitioner, Daniel Wilbur Gardner, did not take the stand to testify in his own behalf.

REASONS FOR NOT GRANTING THE WRIT

A. The imposition of the death penalty is not in conflict with due process of law.

First, it is emphasized that petitioner's argument under this point has already been twice rejected by the Supreme Court of Florida. Please see State v. Dixon, 283 So.2d 1 (Fla. 1973); and Alford v. State, 307 So.2d 433 (Fla. 1975. The Fourteenth Amendment to the United States Constitution provides in part that no state shall "deprive any person of life, liberty or property without due process of law." This principle of restraint on government dates back to June 19, 1215, when the Magna Carta confirmed that: "No freeman shall be taken, or imprisoned, or dissesed, or outlawed, or exiled, or anywise destroyed, nor shall we go upon him, nor send upon him, but by lawful judgment of his peers or by the law of the land." Magna Carta, Ch. 39. The United States Supreme Court has refrained from making a precise definition of "due process of law." Bute v. Illinois, 333 U.S. 640, 92 L.Ed. 986, 68 S.Ct. 763 (1948). But it has been said that due process concerns itself with the denial of fundamental standards of fairness and ideals; not with power or jurisdiction, but with their exercise. Kinsella v. United States, 361 U.S. 234, 4 L.Ed.2d 268, 80 S.Ct. 297 (1960).

Under our system of divided government, the prescribing of guidelines for criminal punishment is within the power of the legislature, not the courts. When the state provides an orderly procedure for the administration of its criminal law, and those laws are administered in a fair and just manner, these procedures constitute "due process of law." Hurtado v. People of California, 110 U.S. 516, 28 L.Ed. 232, 4 S.Ct. 111 (1884).

B. The imposition of the death penalty is not prohibited under the cruel and unusual punishment provision of the federal and state constitutions.

The Eighth Amendment to the United States Constitution provides that: "Excessive bail shall not be required, nor excessive fines shall not be imposed, nor cruel or unusual punishment inflicted." Section 8, Declaration of Rights, Florida Constitution, states as follows: "Excessive

bail shall not be required, nor excessive fines be imposed, nor cruel or unusual punishment, or indefinite imprisonment be allowed, nor shall witnesses be unreasonably detained." In Collins v. Johnston, 237 U.S. 502, 59 L.Ed. 1071, 35 S.Ct. 649 (1915), it was held that the Eighth Amendment to the United States Constitution was a limitation on the powers of the federal government, not the states. This holding does not appear to have been specifically overturned. See In re Riddle, 22 Cal.Rptr. 472, 372 P.2d 304 (1962). However, more recent decisions would seem to indicate that the Fourteenth Amendment's Due Process Clause prohibits states from inflicting cruel and unusual punishment. U.S. Const. Amend. 14. See State of La. ex rel. Francis v. Resweber, 329 U.S. 459, 91 L.Ed. 422, 67 S.Ct. 374 (1947); Robinson v. California, 370 U.S. 660, 8 L.Ed.2d 758, 82 S.Ct. 1417 (1962). No issue need be made on this point, however, because the acts prohibited by both federal and state constitutions may be and are determined by the same standards.

Initially, it must be borne in mind that the act of imposing the death penalty on petitioner cannot be attacked as cruel and unusual punishment. This is because of the rule that a penalty which is imposed within the terms of a valid statute cannot be cruel and unusual punishment--the statute itself must be attacked.[1]

[1]Federal cases: United States v. Wallace, 269 F.2d 394 (3rd Cir., 1959); Overstreet v. United States, 367 F.2d 83 (5th Cir., 1966); Akers v. United States, 280 F.2d 198 (6th Cir., 1960), cert. den. 364 U.S. 924, 5 L.Ed.2d 262, 81 S.Ct. 289; United States v. Sorcey, 151 F.2d 899 (1946); Hess v. United States, 254 F.2d 578 (8th Cir., 1958); Martin v. United States, 317 F.2d 753 (9th Cir., 1963); Smith v. United States, 273 F.2d 462 (10th Cir., 1959).

State cases: State v. Cuzick, 97 Ariz. 130, 397 P.2d 629 (1964); Blake v. State, 244 Ark. 37, 423 S.W.2d 544 (1968);

The most recent detailed and considered treatment of the concept of "cruel and unusual punishment" given by the United States Supreme Court is found in Weems v. United States, 217 U.S. 349, 54 L.Ed. 793, 30 S.Ct. 544 (1910). In that case a portion of the Penal Code of the Philippine Islands was held unconstitutional. The statute involved authorized punishing a public official for making a false entry on a public record concerning a payment of 616 pesos by a fine of 4,000 pesos, imprisonment of over twelve years with accessories (including carrying chains and deprivation of civil rights during imprisonment), lifetime disqualification from enjoyment of political rights and the holding of office, and perpetual subjection to surveillance. Mr. Justice McKenna's opinion of the court discusses at great length the history, development and meaning of the cruel and unusual punishment prohibition. In language and with reasoning which has not been contradicted to this day, the court said the following with regard to the power of legislatures to define crimes and their punishment:

> "...We concede the power in most of its exercises. We disclaim the right to assert a judgment against that of the legislature of the expediency of the laws or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such case not our discretion but our legal duty, strictly defined and imperative in its direction, is invoked. Then the legislative power is brought

State v. McNally, 152 Conn. 598, 211 A.2d 162 (1965); Chavigny v. State, 122 So.2d 910 (Fla.App., 1959); King v. State, 416 P. 2d 44 (Idaho, 1966); People v. Calcaterra, 33 Ill.2d 541, 213 N.E.2d 270 (1965); Monson v. Commonwealth, 294 S.W.2d 78 (Ky., 1956); Dobson v. Warden, Maryland Penitentiary, 214 Md. 654, 135 A.2d 890 (1957); State v. Westfall, 367 S.W.2d 593 (Mo., 1963); State v. Pohlabel, 40 N.J. Super: 416, 123 A.2d 391 (1956) State v. Downey, 253 N.C. 348, 117 S.E.2d 39 (1960); McDougle v. Maxwell, 1 Ohio St. 2d 68, 203 N.E.2d 334 (1964); Hardin v. State, 210 Tenn. 116, 355 S.W.2d 105 (1962); Jacke v. State, 167 Tex. Cr. 1, 317 S.W.2d 731 (1958).

to the judgment of a power superior to it for the instant. And for the proper exercise of such power there must be a comprehension of all that the legislature did or could take into account, that is, a consideration of the mischief and the remedy. However, there is a certain subordination of the judiciary to the legislature. The function of the legislature is primary, its exercises fortified by presumption of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety. They have no limitation, we repeat, but constitutional ones, and what those are the judiciary must judge. We have expressed these elementary truths to avoid the misapprehension that we do not recognize to the fullest the wide range of power that the legislature possesses to adapt its penal laws to conditions as they may exist and punish the crimes of men according to their forms and frequency. We do not intend in this opinion to express anything that contravenes those propositions." 217 U.S. at 378, 54 L.Ed. at 803, 30 S.Ct. at 553.

Wilkerson v. Utah, 99 U.S. 130, 25 L.Ed. 345 (1878), involved a sentence of death by shooting, following a conviction for premeditated murder. In upholding the constitutionality of the sentence, the court considered the following historical background and meaning of the prohibition against cruel and unusual punishment:

"Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment. Soldiers convicted of desertion or other capital military offences are in the great majority of cases sentenced to be shot, and the ceremony for such occasions is given in great fullness by the writers upon the subject of courts-martial. Simmons, secs. 759, 760; Dehart, pp. 247, 248.

"Where the conviction is in the civil tribunal, the rule of the common law was that the sentence or judgment must be pronounced or rendered by the court in which the prisoner was tried or finally condemned, and the rule was universal that it must be such as is annexed to the crime by law. Of these, says Blackstone, some are capital, which extend to the life of the offender, and consist generally in being hanged by the neck till dead. 4 Bl. Com. 377.

"Such is the general statement of that commentator, but he admits that in very atrocious crimes other circumstances of terror, pain, or disgrace were sometimes superadded. Cases mentioned by the author are, where the prisoner was drawn or dragged to the place of execution, in treason; or where he was embowelled alive, beheaded, and quartered, in high treason. Mention is also made of public dissection in murder, and burning alive in treason committed by a female. History confirms the truth of these atrocities, but the commentator states that the humanity of the nation by tacit consent allowed the mitigation of such parts of those judgments as savored of torture or cruelty, and he states that they were seldom strictly carried into effect. Examples of such legislation in the early history of the parent country are given by the annotator of the last edition of Archbold's Treatise. Arch. Crim. Pr. and Pl. (8th ed.) 584.

"Many instances, says Chitty, have arisen in which the ignominious or more painful parts of the punishment of high treason have been remitted, until the result appears to be that the king, though he cannot vary the sentence so as to aggravate the punishment may mitigate or remit a part of its severity. I Citt. Cr. L. 787; 1 Hale, P. C. 370.

"Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution. Cooley, Const. Lim. (4th ed.) 408; Wharton, Cr.L. (7th ed.), sect. 3405." 99 U.S. 134-36, 25 L.Ed. 347-48.

In re Kemmler, 136 U.S. 436, 34 L.Ed. 519, 10 S.Ct. 930 (1890), upheld the constitutionality of imposition of the death penalty by electrocution following a conviction of murder. The court discussed the Wilkerson case, supra, and said:

"...Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." 136 U.S. at 447, 34 L.Ed. at 524, 10 S. Ct. at 933.

The death penalty did not appear as a cruel and unusual punishment issue in the United States Supreme Court again for fifty-seven years. In State of Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 91 L.Ed. 422, 67 S.Ct. 374 (1947), the court was confronted with the unique plight of Willie Francis, whose electrocution for murder aborted due to a mechanical failure in Louisiana's electric chair. In rejecting Francis' claim that reimposition of the death sentence was unconstitutional, the court said:

> "Second. We find nothing in what took place here which amounts to cruel and unusual punishment in the constitutional sense. The case before us does not call for an examination into any punishments except that of death. See Weems v. United States, 217 U.S. 349. The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment. The Fourteenth would prohibit by its due process clause execution by a state in a cruel manner." 329 U.S. at 463, 91 L.Ed. at 426, 67 S.Ct. at 376.

The next time the court considered the death penalty was in Williams v. People of State of New York, 337 U.S. 241, 93 L.Ed. 1337, 69 S.Ct. 1079 (1949), reh. den. 337 U.S. 961, 93 L.Ed. 1760, 69 S.Ct. 1529, reh. den. 338 U.S. 841, 94 L. Ed. 514, 70 S.Ct. 34. In that case it was held that petitioner was not denied due process of law when a trial judge imposed the death penalty following a hearing at which the court considered hearsay information. The jury had recommended life imprisonment, but New York law gave the trial judge discretion to impose the death penalty notwithstanding a jury's recommendation for mercy.

The most recent treatment of the death penalty by the United States Supreme Court is found in Williams v. State of Oklahoma, 358 U.S. 576, 3 L.Ed.2d 516, 79 S.Ct. 421 (1959), reh. den. 359 U.S. 956, 3 L.Ed.2d 763, 79 S.Ct. 737. At issue was petitioner's death sentence on a state kidnapping charge. The court said:

> "Petitioner's further claims that the sentence to death for kidnaping was 'disproportionate' to that crime and to the life sentence that had earlier been imposed upon him for the 'ultimate' crime of murder proceeds on the basis that the sentence for kidnaping was excessive, that the murder was the greater offense, and that the sentence for the lesser crime of kidnaping ought not, in conscience and with due regard for fundamental fairness, exceed the life sentence that was imposed in another jurisdiction for the murder. But the Due Process Clause of the Fourteenth Amendment does not, nor does anything in the Constitution require a State to fix or impose any particular penalty for any crime it may define or to impose the same or 'proportionate' sentences for separate and independent crimes. Therefore, we cannot say that the sentence to death for the kidnaping, which was within the range of punishments authorized for that crime by the law of the State, denied to petitioner due process of law or any other constitutional right." 358 U.S. at 586, 3 L.Ed.2d at 523, 79 S.Ct. at 427.

Not only has the United States Supreme Court refused to hold that the establishment and imposition of the death penalty are unconstitutional acts,[2] there is absolutely no

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[2]Certiorari was denied in Rudolph v. State of Alabama, 175 U.S. 889, 11 L.Ed.2d 119, 84 S.Ct. 155 (1963) over the objections of Justices Goldberg, Douglas, and Brennan, who wanted to consider whether the eighth and fourteenth amendments to the United States Constitution permit the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life.

discernible trend toward that position in the courts of this country. Thirty-one state courts[3] and ten federal courts[4] have considered constitutional objections to the death penalty, and the law has been upheld on every occasion. From 1878, when the United States Supreme Court upheld the death penalty in Wilkerson v. Utah, supra, to the decision of the Supreme Court of Kansas on April 6, 1968, State v. Kilpatrick, 439 P.2d 99 (Kan., 1968), no court has taken the position advocated by petitioner in the case at bar.

The foregoing clearly establishes that the death penalty per se does not fall within the purview of constitutional prohibitions, "cruelty" refers to matters such as prolonged torture or the inhumane treatment of prisoners. See e.g. Wright v. McMann, 387 F.2d 519 (2nd Cir., 1967); Jackson v. Bishop, 268 F.Supp. 804 (E.D. Ark., 1967); Jordon v. Fitzharris, 257 F.Supp. 674 (N.D.Cal., 1966). "Unusual" punishment refers to a punishment that is substantially different from that provided by similar jurisdictions. Weems v. United States, supra. Legislative authorization for imposition of the death penalty is not unusual in the United States. Respondent therefore submits that petitioner's contentions regarding cruel and unusual punishment are without merit.

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[3]ALABAMA: Boykin v. State, 207 So.2d 412 (Ala., 1968); Ex parte Rudolph, 276 Ala. 392, 162 So.2d 486 (1964); Lee v. State, 227 Ala. 2, 160 So. 164 (1933); cert. den. 227 Ala. 334, 150 So. 169 (1933); Bailey v. State, 211 Ala. 667, 101 So. 546 (1924); ARIZONA: Hernandez v. State, 43 Ariz. 424, 33 P.2d 18 (1934); CALIFORNIA: People v. Thomas, 56 Cal.Rptr. 305, 423 P.2d 233 (1967); People v. Bashor, 48 Cal. 2d 763, 312 P.2d 255, (1957); People v. Jefferson, 47 Cal.2d 438, 303 P.2d 1024 (1956); People v. Daugherty, 40 Cal.2d 876, 256 P.2d 911 (1953), cert. den. 346 U.S. 827, 98 L.Ed.352, 74 S.Ct. 47, reh. den. 346 U.S. 880, 98 L.Ed. 387, 74 S.Ct. 126; People v. Lazarus, 207 Cal. 507, 279 Pac. 145 (1929); People v. Oppenheimer, 156 Cal. 733, 106 Pac. 74 (1910); COLORADO: Bell v. People, 431 P.2d 30 (Colo. 1967); CONNECTICUT: State v. Walters, 145 Conn. 60, 138 A.2d 786 (1958); FLORIDA: Watson v. State, 190 So.2d 161 (Fla. 1966); Craig v. State, 179 So.2d 202 (Fla. 1965); Ferguson v. State, 90 Fla. 105, 105 So.2d 840 (1925); GEORGIA: Manor v. State, 223 Ga. 594, 157 S.E.2d 431 (1967); Abrams v. State, 223 Ga. 216, 154 S.E.2d 118 (1966); Whisman v. State, 221 Ga. 460, 145 S.E.2d 499 (1965); Sims v. State, 221 Ga. 190, 144 S.E.2d 103 (1965); Massey v. State, 220 Ga. 883, 142 S.E.2d 832 (1965); Trimble v. State, 220 Ga. 229, 138 S.E.2d 274 (1964); Vanleeward v. State, 220 Ga. 135, 137 S.E. 452 (1964); Sims v. Balcom, 220 Ga. 7, 136 S.E.2d 766 (1964); ILLINOIS: People v. Chesnas, 325 Ill. 361, 156 N.E. 372 (1927); INDIANA: McCutcheon v. State, 199 Ind. 247, 155 N.E. 544 (1927); IOWA: State v. Burris, 194 Iowa 628, 190 N.W. 38 (1922); KANSAS: State v. Kilpatrick, 439 P.2d 99 (Kan., 1968); KENTUCKY: Workman v. Commonwealth, 309 Ky. 117 216 S.W.2d 415 (1948); Gibson v. Commonwealth, 204 Ky. 748, 265 S.W. 339 (1924); MARYLAND: Jones v. State, 247 Md. 533, 233 A.2d 791 (1967); Dyson v. State, 238 Md. 398, 209 A.2d 609 (1965); Walker v. State, 186 Md. 440, 47 A.2d 47 (1946); Dutton v. State, 123 Md. 373, 91 Atl. 417 (1914); MASSACHUSETTS: In re Storti, 178 Mass. 549, 60 N.E. 210 (1901); MISSISSIPPI: Yates v. State, 253 Miss. 424, 175 So.2d 617 (1965); Gordon v. State, 160 So.2d 73 (Miss., 1964); MISSOURI: State v. Burnett, 365 Mo. 1060, 293 S.W.2d 335 (1956); State v. McGee, 361 Mo. 309, 234 S.W.2d 587 (1950); NEBRASKA: State v. Alvarez, 182 Neb. 358, 154 N.W.2d 746 (1967); NEVADA: Hinrichs v. First Judicial Dist. Court in and For Ormsby County, 71 Nev. 168, 283 P.2d 614 (1955); State v. Geejon, 46 Nev. 418, 211 Pac. 676 (1923); NEW JERSEY: State v. Tomasi, 75 N.J. Law 739, 69 Atl. 214 (1908); NEW MEXICO Territory of New Mexico v. Ketchum, 10 N.M. 718, 65 Pac. 169 (1901); NEW YORK: People v. Durston, 119 N.Y. 569, 24 N.E. 6 (1890); NORTH CAROLINA: State v. Yoes, 271 N.C. 616, 157 S.E. 2d 386 (1967); OHIO: State v. McClellan, 12 Ohio App.2d 204, 232 N.E.2d 414 (1967); Holt v. State, 107 Ohio St. 307, 140 N.E. 349 (1923); OKLAHOMA: Johnson v. State, 79 Okl.Cr. 363, 155 P.2d 259 (1945); Tuggle v. State, 73 Okl.Cr. 208, 119 P.2d 857 (1942); Ellis v. State, 54 Okl.Cr. 295, 19 P.2d 972 (1933); Robards v. State, 37 Okl.Cr. 371, 259 Pac. 166 (1927); OREGON: State v. Butchek, 121 Or. 141, 253 Pac. 367 (1927); SOUTH CAROLINA: State v. Gamble, 155 S.E.2d 916 (So.Car., 1967); Morrer v. McDougal, 245 S.C. 633, 142 S.E.2d 216 (1965); TEXAS: Ellison v. State, 419 S.W.2d 849 (Tex.Cr.App., 1967); Haley v. State, 157 Tex.Crim. 150, 247 S.W.2d 400 (1952); Saucier v. State, 156 Tex.Crim. 301, 235 S.W.2d 903 (1950); Kelley v. State, 124 Tex. Crim. 579, 63 S.W.2d 1024 (1933); VIRGINIA: Johnson v. Commonwealth, 208 Va. 481, 158 S.E.2d 725 (1968); Hart v. Commonwealth, 131 Va. 726, 109 S.E. 582 (1921); WASHINGTON: State v. White, 60 W.2d 551, 374 P.2d 942 (1962); WEST VIRGINIA: State v. Painter, 135 W.Va. 106, 63 S.E.2d 86 (1950); State v. Burdette, 135 W.Va. 312, 63 S.E.2d 69 (1950); WYOMING: Jenkins v. State, 22 Wyo. 34, 135 Pac. 749 (1913).

[4]United States v. Curry, 358 F.2d (2nd Cir., 1966); United States v. Rosenberg, 195 F.2d 583 (2nd Cir., 1952), cert. den. 344 U.S. 838, 97 L.Ed. 652, 73 S.Ct. 20; United States ex rel. Melton v. Hendricks, 330 F.2d 263 (3rd Cir., 1964); Petition of Ernst, 294 F.2d 556 (3rd Cir., 1961); Ralph v. Pepersak, 335 F.2d 128 (4th Cir., 1964); Harris v. Stephens, 361 F.2d 888 (8th Cir., 1966); United States v. Coon, 360 F.2d 550 (8th Cir., 1966) Mitchell v. Stephens, 353 F.2d 129 (8th Cir., 1965); Jackson v. Dickson, 325 F.2d 573 (9th Cir., 1963); Skaug v. Sheehy, 157 F.2d 714 (9th Cir., 1946).

CONCLUSIONS RE: DEATH PENALTY

The most recent appellate decision known to this writer in which a court made an in-depth review of the death penalty is found in the October 29, 1968 opinion of the Washington Supreme Court in State of Washington v. Smith, et al., 466 P.2d 571 (Wash. 1968). This was a case in which the defendants appealed from judgments and sentences entered on verdicts of guilty of two counts of murder in the first degree, four counts of robbery, and one count of assault in the first degree. The special verdicts of the jury imposed the death penalty upon each of them for the second murder count, but only a life sentence for the first. The court ordered that the death penalty should take precedence over the penalties for the other crimes.

On appeal, the defendants claimed that the death penalty was illegally imposed for a number of reasons. The Supreme Court of Washington in rejecting the argument that the death penalty constitutes cruel and unusual punishment remarked as follows:

> "The eighth amendment to the United States Constitution states: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'
>
> "Article 1, section 14, of the Washington State Constitution also provides that 'cruel punishment' shall not be inflicted.
>
> "The contention of the defendants here is that the death penalty, even when executed in such a way as to cause a minimum of physical suffering, violates these provisions.
>
> [25] As in the case of the defendants' argument that the taking of life by the state in itself is a denial of due process, the constitutions refute the defendants' contentions. Both constitutions recognize the validity of capital punishment, the federal constitution in amendment 5 and the state constitution in article 1, section 20, which provides that all persons charged with crime shall be bailable, except for capital offenses when the proof is evident or the presumption great.

> "By any dictionary, including Black's Law Dictionary, a capital offense is one punishable by death. The only way these provisions of the two constitutions can be reconciled with provisions forbidding cruel punishment is to conclude that the framers did not consider capital punishment, per se, to be either cruel or unusual, in the sense in which they used those terms in the constitutions.
>
> "Again, the defendants cite no authorities supporting their proposition that the infliction of capital punishment violates these constitutional provisions.
>
> "The Supreme Court of the United State has upheld the validity of executions by shooting (Wilkerson v. Utah, 99 U.S. 130, 25 L.Ed. 345 (1878). Other cases in which the penalty has been approved include Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 91 L.Ed. 422, 67 Sup.Ct. 374 (1947), rehearing denied, 330 U.S. 853, 91 L.Ed. 1295, 67 Sup.Ct. 673; Williams v. New York, 337 U.S. 241, 93 L.Ed. 1337, 69 Sup.Ct. 1079 (1949), rehearing denied 337 U.S. 961, 93 L.Ed. 1760, 69 Sup. Ct. 1529, rehearing denied 338 U.S. 841, 94 L.Ed. 514, 70 Sup.Ct. 34; and Williams v. Oklahoma, 358 U.S. 576, 3 L.Ed.2d 516, 79 Sup.Ct. 421 (1950), rehearing denied 359 U.S. 956, 3 L.Ed.2d 763, 79 Sup.Ct. 737. Also, the recent case of Witherspoon v. Illinois, 36 U.S.L.W. 4504 (U.S. June 3, 1968), tacitly recognizes the right of a state to provide for the death penalty.
>
> "The defendants do not suggest that the means of execution provided by the statutes of this state is unnecessarily cruel. They do argue vigorously and persuasively that the pronouncement of the death sentence, whatever the means to be used in its execution, subjects the condemned individual to great mental and emotional agony; that the execution of an individual by society is premeditated killing and is immoral; that it is not a deterrent to anyone except the person executed, and that it thwarts the legitimate purposes of rehabilitation. It might also be added that it destroys valuable subject matter for the scientific study of the causes of crime.
>
> "These are all arguments which should be addressed to the legislature, and which have prevailed in the legislatures of a number of states. If, as the defendants maintain, 'upwards of fifty percent' of the people today are opposed to the death penalty, an effort to obtain the elimination of this penalty should have a considerable chance of success."

We think it is wanton murder that brutalizes human nature and cheapens human life, not the penalty for its perpetration. We are not impressed with the argument against capital punishment on the ground of its inhumanity. Of course, it is inhumane. So is murder. But our charity for all human beings must not deprive us of our common sense.

True Christian charity is based upon justice, the proper concern for the weak and innocent, not upon a soft-headed regard for despicable and conspiratorial killers.

Sub judice, the Findings of Fact submitted by the trial judge in support of the death sentence proves conclusively that no mitigating circumstances were ignored. A separate and plenary hearing was conducted on the penalty issue as required by Section 921.141(1), Florida Statutes (R Vol.III, pp. 323-349). The jury was correctly instructed as to their duty in this second phase of the trial (R Vol. III, pp. 350-354), and then the trial judge reread the entire jury instructions to them (R Vol.III, pp. 354-357). Petitioner made no request for any additional instructions or for any corrections to be made to the instructions as given in this phase of the trial (R Vol.III, p. 357). Petitioner had ample opportunity to present anything he so desired for consideration by the jury as a mitigating circumstance. No request was made for the sentencing phase to be continued for the purpose of securing mitigating testimony. Petitioner did not argue in his brief filed in the court below that other mitigating testimony should have been presented to the jury (and the judge) but that he was unable to do so because of lack of time.

In the Findings of Fact (R Vol.I, pp. 49, 50), the trial judge stated:

> "The capital felony was especially heinous, atrocious or cruel; and that such aggravating circumstances outweigh the mitigating circumstances, to-wit: none; and based upon the records of such trial and sentencing proceedings makes the following findings of facts,...."

But petitioner would have this Court believe that since the trial judge found no mitigating circumstances, "The court did not consider appellant's alcohol induced disturbance." (See p. 19 of Appellant's brief filed in the Florida Supreme Court.) However, this begs the question. The real issue was whether petitioner was in an alcoholic stupor when he perpetrated the crime. To have found this to be true, the trial judge of necessity would have had to accord absolute verity to petitioner's testimony given in the sentencing phase of the trial and disregard the testimony of other witnesses who saw him shortly before and after the commission of the crime and testified to his alcoholic state at the trial on the merits. It must be emphasized that the trial judge in considering the sentence to be imposed was not restricted to the testimony of petitioner given in the sentencing phase. Section 921.141(3)(b) provides in pertinent part that when the court imposes the death sentence,

> "...the determination of the court shall be supported by specific written findings of fact...and upon the records of the trial and the sentencing proceedings." (Emphasis supplied.)

Thus, the trial judge had statutory authority to consider the testimony and evidence adduced at the trial proper in arriving at his determination to impose the death sentence. Please see the testimony of Glenda Mae Demney at R Vol.II, pp. 175, 176. Alva Loenecker "Bcukshot" testified that petitioner was "as good a friend as I ever had." But at no time did this witness testify that petitioner was even so much as drinking on the night

of June 29, 1973, let alone being in an alcoholic stupor. In fact, his testimony describing the actions of petitioner on the night in question points unmistakably to the fact that petitioner was in full possession of his faculties (R Vol.II, pp. 185-195). Nellie Merkerson, mother of petitioner, talked with her son on the morning of June 30, 1973 and testified as to the conversation she had with him. At no point in her testimony do we find anything about petitioner telling her that he had been drunk or in an alcoholic stupor. Rather, her testimony as to what petitioner told her clearly shows that there was an argument about the location of the children and petitioner "kept on beating her, she never would tell me where my babies...." This testimony indicates that petitioner had a clear memory of what he had done instead of being in any alcoholic stupor. The trial judge did consider and weigh the evidence presented at the sentencing proceeding as he so states in the Findings of Fact (R Vol.I, p. 49). The simple truth is that the trial judge did not believe the testimony of petitioner given at the sentencing proceeding when viewed in the light of all the testimony adduced at the trial which he was required to consider.

The record shows that the jury returned its verdict of guilt on January 10, 1974 (R Vol.III, p. 322). The second phase or sentencing proceeding was immediately begun (R Vol.III, p. 323). The jury's Advisory Sentence was returned on the same date, January 10, 1974 (R Vol.I, p. 44). However, the trial judge's Findings of Fact was not filed until January 30, 1974, and the death sentence was imposed on the same date. Simple arithmetic shows that the trial judge had a period of twenty days within which to mull over, cogitate on, consider and weigh all of the testimony adduced at the trial and at the sentencing proceeding. Certainly, it cannot be successfully argued that the trial judge was in any haste or in any way eager to impose the death penalty. This was done after an ample period of reflection and consideration of all the proceedings and should not be disturbed by this Court.

It can be agreed that there are many regrettable aspects of life which influence deeds such as the one for which petitioner was convicted and which led to the verdict imposed against him; but insofar as this writer is able to judge, the denial of a fair trial, as the law in its present state can provide it, was not one one of these.

QUESTION TWO

THE TRIAL JUDGE DID NOT ERR IN CONSIDERING FACTUAL ALLEGATIONS IN A PRE-SENTENCE INVESTIGATION REPORT WHERE THE DEATH SENTENCE WAS IMPOSED.

Petitioner's argument under this point is untenable. The simple truth is that if the trial judge had failed to order a pre-sentence investigation, then petitioner would have been able to argue reversible error at least with colorable merit. Rule 3.710, Florida Rules of Criminal Procedure provides:

> "RULE 3.710. PRESENTENCE REPORT
>
> "[Prior Rule 3.710 transferred to Rule 3.730]
>
> "In all cases in which the court has discretion as to what sentence may be imposed, the court may refer the case to the probation and parole commission for investigation and recommendation. No sentence or sentences other than probation shall be imposed on any defendant found guilty of a first felony offense or found guilty of a felony while under the age of 18 years, until after such investigation has first been made and the recommendations of the commission received and considered by the sentencing judge."

The above rule requires the use of a presentence investigation report as a part of the sentencing procedure in two instances:

(1) Where the defendant has been found guilty of a first felony offense, or

(2) Found guilty of a felony while under the age of 18 years. Petitioner in his brief filed in the Florida Supreme Court on p. 13 thereof frankly stated that he had never been convicted. We quote:

> "Some of the offenses for which appellant had previously been arrested were the type of offenses encompassed by §921.141 (6)(b), but there were no convictions." (Emphasis theirs.)

Petitioner's statement in this respect is borne out by a copy of his F.B.I. rap sheet as set out in the presentence investigation conducted by the Florida Parole and Probation Commission. Please see page 9 of supplement to transcript of record. Another thing: Rule 3.710 authorizes the trial judge to refer "all cases in which the court has discretion as to what sentence may be imposed" to the Parole and Probation Commission for investigation and recommendation. Respondent does not believe that it can be successfully contended that Section 921.141 does not authorize the use of discretion by the trial judge in the sentencing procedure in capital cases. The Florida Supreme Court recognized such judicial discretion in State v. Dixon, 283 So.2d 1 (Fla. 1973), wherein the court remarked in pertinent part as follows:

> "Thus, if the judicial discretion possible and necessary under Fla.Stat. §921.141, F.S.A., can be shown to be reasonable and controlled, rather than capricious and discriminatory, the test of Furman v. Georgia, supra, has been met." Id. at 7.

That the judicial discretion permitted under the statute can be shown to be reasonable and controlled, the Florida Supreme Court pointedly remarked:

> "Thus, the discretion charged in Furman v. Georgia, supra, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all." Id. at p. 10.

It is respectfully submitted as the Florida Supreme Court so cogently pointed out in Dixon that the mere presence of discretion in the sentencing procedure is not violative of any constitutional right. Rather, it was the quality of discretion and manner in which it was applied that mandated the result in Furman.

But petitioner argues that the consideration of the presentence investigation report vitiated the sentence "in this case by taking the sentencing process out of the bounds established by Fla.Stat. §921.141." Petitioner argues that the presentence investigation report contained allegations that were not based upon the records of the trial and the sentencing proceedings as required by Section 921.141(3)(b). We think this argument goes wide of the mark. Section 921.141(3)(b) provides in pertinent part as follows:

> "In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon ... the records of the trial and the sentencing proceedings."

It is submitted that the use of a presentence investigation report is, indeed, a part of the "sentencing proceedings." Please see 1972 Committee Note appended to Rule 3.710

The trial judge truthfully was eminently correct in ordering the presentence investigation. How else would the trial judge be able to determine whether or not petitioner had previously been convicted of another

capital felony or of a felony involving the use or threat of violence to the person as required by Section 921.141(5)(b)? How else but through the use of a presentence investigation report would the trial judge be able to determine whether or not petitioner had any significant history of prior criminal activity? This is required by Section 921.141(6)(a). Certainly, petitioner must have been aware of the importance of a presentence investigation report because at the trial when the trial judge ordered the presentence investigation, petitioner made no objection thereto (R Vol.III, p. 357). Petitioner filed two motions for new trial, the first of which is found at R Vol.I, p. 46, but nothing is alleged therein about the trial judge having committed reversible error by ordering a presentence investigation. The second motion for new trial is found at R Vol.I, pp. 54-62 but even in this long and comprehensive pleading, nothing is alleged therein about the trial judge having committed reversible error by ordering a presentence investigation report. Interestingly, in Paragraph 19 of this second motion for new trial (R Vol.I, pp. 58, 59), petitioner contends that the circumstances that may be considered in mitigation under Section 921.141 are inadequate, vague, and insufficient. Petitioner argues that his military history, honorable conduct or bravery, motive (if appropriate), his family and its needs, his prior suffe-ing from other than mental conditions, his prior or subsequent moral convictions and behavior, etc. are omitted as mitigating circumstances under Section 921.141(6). However, since the jury returned an Advisory Opinion favorable to him, the question is now academic. Be that as it may, petitioner had ample opportunity to submit anything he so desired in mitigation. The reason respondent points up this matter is because the very items, the alleged absence of which petitioner now complains, can and were reached through the use of a presentence investigation report. The real bone of contention is that because the investigation of the items mentioned in Paragraph 19 of petitioner's second motion for new trial revealed nothing favorable to him, then, of course there was a gross miscarriage of justice and the presentence investigation should never have been ordered. In other words, so petitioner contends, it is alright for a trial judge to order a presentence investigation as long as the results thereof are favorable to him. But when the results are unfavorable, then the trial judge has grossly abused the constitutional rights of petitioner. Respondent finds this a rather specious, if not ridiculous, argument and for this Court to embrace it would be tantamount to petitioner having his cake and eating it too.

In summary, the trial judge was required to order the presentence investigation report; no objection thereto was made by petitioner at trial; the issue was not raised on motion for new trial; use of a presentence investigation report is a part of the sentencing process and is necessary in arriving at a reasoned judgment; and respondent does not believe that the issue of whether non-disclosure of a "confidential" portion of a presentence investigation report was raised in the court below.

The references to the trial transcript have been abstracted and are attached hereto as Appendix C. The references to the brief filed by petitioner in the court below have been abstracted and are attached as Appendix D.

CONCLUSION

The petition for writ of certiorari should be dismissed.

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